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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAURICE NORWOOD, Defendant and Appellant.	B252000 (Los Angeles County Super. Ct. No. YA086816)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Maurice Norwood was convicted by jury of making a criminal threat (Pen. Code, § 422, subd. (a))[1] and vandalism (§ 594, subd. (a)).[2] Defendant admitted he suffered a prior serious felony conviction (§ 667, subd. (a)(1)). The trial court sentenced defendant to the midterm of two years in state prison for the section 422 violation, enhanced by five years for defendant's prior conviction. Defendant contends the court prejudicially erred in failing to instruct the jury, sua sponte, that his out-of-court statement should be viewed with caution, as set forth in CALCRIM No. 358 or CALJIC No. 2.71.7. We conclude the failure to give a cautionary instruction was not prejudicial error. The judgment is affirmed.

FACTS

1. *Prosecution evidence.*

On March 4, 2013, Mahbubur Rahman and his wife were at work in their market. The cashier's counter was in a bullet proof, locked, enclosed area. Defendant wanted to buy a can of beer, which cost $ 2.00, from the cooler but he only had $1.80 to pay for it. Rahman refused to sell the beer for less than its full price, let defendant take the beer and make up the difference later, or let defendant pay with his food stamps card. Defendant obtained 20 cents from a child who was waiting to buy candy, and he told Rahman to put the child's candy on the card. Rahman refused. Defendant became very angry. He used bad language, slammed the pin pad machine against the counter, and threw a jar of red vines against a shelf, which caused items to fall off the shelf and break. Rahman told defendant to leave the store. Defendant left. Rahman began to clean up the broken glass on the floor.

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[1] All further references are to the Penal Code unless otherwise specified.

[2] The court reduced the vandalism conviction from a felony to a misdemeanor. The jury found defendant not guilty of assault with a deadly weapon (§ 245, subd. (a)(1)).

A few minutes later, defendant returned to the store carrying a sledgehammer and baseball bat. Defendant dropped the baseball bat and raised up the sledgehammer with both hands, indicating he would strike Rahman. Rahman ran into the enclosed area behind the sales counter to join his wife. As Rahman called 911, defendant repeatedly told him, "come out, come out, motherfucker." Rahman was afraid defendant would kill him and his wife. In the 911 call, Rahman told the dispatcher someone was hitting the counter and messing up the store with a large hammer and the person also had a baseball bat. Defendant left the store, and as he left, he struck the sign outside the store with the sledgehammer.

2. *Defense evidence.*

Defendant did not call any witnesses. He introduced into evidence photographs depicting the store and area outside the store.

DISCUSSION

Failure to give cautionary instruction.

Defendant does not contend substantial evidence does not support the finding he made a criminal threat under section 422, subdivision (a).[3] He does not contend his statement to Rahman, "come out, come out," while holding up a sledgehammer, was not a criminal threat.

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[3] Section 422, subdivision (a) provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

He contends the court prejudicially erred by failing to instruct the jury, sua sponte, with a cautionary instruction, in the language of CALCRIM No. 358 or CALJIC No. 2.71.7, that evidence of a defendant's oral statements must be viewed with caution. "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made[,]" including whether the statement was reported accurately. (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) " 'It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.' [Citation.]" (*People v. Bemis* (1949) 33 Cal.2d 395, 399.)

The question whether the court must instruct the jury sua sponte to view with caution evidence of a defendant's oral, extrajudicial statement that is alleged to violate section 422 is pending before the Supreme Court. (*People v. Diaz*, review granted Sept. 18, 2012, S205145 ("*People v. Diaz*").)[4]

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[4] The Supreme Court granted review to decide the following issues: "(1) Did the trial court err by failing to instruct the jury sua sponte that it must consider defendant's extrajudicial, oral statements with caution when the statements constituted the criminal act? (2) If so, did the Court of Appeal correctly conclude that the trial court's failure to instruct was harmless error?" (Cal. Rules of Court, rule 8.520(a)(6).)" (*People v. Diaz*, order filed Nov. 20, 2012.) Subsequently, additional briefing was ordered relating to the issues specified under the initial grant of review. (*People v. Diaz*, order filed Dec. 13, 2013.) The Attorney General's supplemental reply brief was filed June 20, 2014. (California Courts, Appellate Courts Case Information http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2024259&doc_no=S205145 [as of Jan. 20, 2015].)

Where a cautionary instruction is required to be given, "[its] omission . . . does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probably that a result more favorable to [the] defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836 . . . .)" (*People v. Beagle, supra*, 6 Cal.3d at pp. 455-456.)

We need not decide defendant's contention, because, based on our independent review of the evidence, in light of the jury instructions, there is "no reasonable probability that the jury would find that the statements either were not made or were not reported accurately." (*People v. Beagle, supra*, 6 Cal.3d at p. 456.) Thus, any error in failing to give a cautionary instruction is harmless under the applicable test of prejudicial error, set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836.

The jury was instructed in the language of CALCRIM No. 220 on the presumption of innocence and the prosecution's burden of proof, including that "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." The jury was instructed substantially in the language of CALCRIM No. 226 on evaluation of witness credibility, including the instruction that the jury may consider: "How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] . . . [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, . . . or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] . . . [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful?" The jury was instructed in the language of CALCRIM No. 301 that "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Rahman's testimony that defendant repeatedly stated, "come out, come out" while wielding a sledgehammer was not contradicted. The statement is short, simple, and easy to remember accurately. "There was 'no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported.' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Any inconsistencies in Rahman's reports concerning whether defendant also stated he would kill, shoot, and hit Rahman do not undermine the evidence that defendant said "come out, come out," while wielding a sledge hammer, because Rahman never recanted and, on every occasion when he reported defendant's words, he consistently reported that defendant made the statement.[5] Rahman reported the statement to the police officer who interviewed him at the scene. At both the preliminary hearing and at trial, Rahman testified defendant made this statement. Defendant's statement was confirmed by a second witness, Rahman's wife. The prosecutor argued to the jury, "even if you just think [defendant] said, 'come out, come out,' combined with his . . . holding the sledgehammer high ready to attack, that's a criminal threat in and of itself."

The fact Rahman did not report the statement to the 911 dispatcher is of little or no probative value on the issue of whether defendant made the statement. The 911 conversation was brief. Rahman testified he was too nervous and frightened to report everything defendant was doing. Rahman had little opportunity to state what defendant said, because, after Rahman began the conversation by asking the 911 dispatcher to send the police because someone was "breaking down my store," the dispatcher asked a series of specific questions about defendant's appearance and weapons and then terminated the call with the announcement that the police were on their way.

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[5] At trial, when Rahman testified defendant did not state the "my ass" part of the statement "come out so I can beat your ass," Rahman did not recant his testimony that defendant told him to "come out."

Nor does defendant's acquittal of the charge of assault with a deadly weapon (§ 245, subd. (a)(1)) undermine the evidence that defendant made the statement. The jury was instructed in the language of CALCRIM No. 875 that the crime of assault with a deadly weapon requires proof, inter alia, that "[t]he defendant did an act with a deadly weapon . . . that by its nature would directly and probably result in the application of force to a person" and "[w]hen the defendant acted, he had the present ability to apply force with a deadly weapon." The jury was instructed on the crime of criminal threat in the language of CALCRIM No. 1300 that, among other things, defendant threatened to cause great bodily injury to Rahman, but "[a]n immediate ability to carry out the threat is not required." Based on these instructions, the jury could find defendant committed criminal threat in the absence of proof defendant had the present ability to cause great bodily injury to Rahman, but could not find defendant committed assault with a deadly weapon without proof defendant had the present ability to apply force with a deadly weapon. There was a conflict in the evidence concerning whether defendant swung the sledgehammer at Rahman before Rahman ran into the enclosed area or just held the hammer up. There was no conflict in the evidence concerning whether defendant told Rahman "come out, come out" while brandishing the hammer.

As we conclude it is not reasonably probable that had the jury been given the cautionary instruction it would have reached a result more favorable to defendant, any error by the court in failing to give a cautionary instruction sua sponte is harmless.

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

KITCHING, J.

ALDRICH, J.